

(2006) 04 BOM CK 0027
In the Bombay High Court
Case No : Criminal P. No. 13 of 2005

Sunil Vassudev Pednekar

APPELLANT

Vs

Bicholim Urban Co-operative Bank Ltd.

RESPONDENT

Date of Decision : 13-04-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202(2), 204, 204(1), 204(1A), 204(2)

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2007) 1 ALD(Cri) 9 : (2007) 3 BC 777 : (2006) 3 CivCC 659 : (2006) CriLJ 3114 : (2006) 3 RCR(Civil) 713 : (2006) 3 RCR(Criminal) 713

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : Shaikh Vahidulla, for the Appellant; N.N. Sardessai, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—Heard Shri Vahidulla, the learned Counsel on behalf of the petitioner/ accused and Shri N. N. Sardessai, the learned Counsel on behalf of the respondent/Complainant.

2. The Complainant has prosecuted the accused u/s 138 of the Negotiable Instruments Act, 1881, for bouncing of three cheques in the sum of Rs. 7,20,000/-. The accused has challenged two Order of the learned J.M.F.C. in the said case. The first Order dated 16-01-2001, issuing process against the accused and the other dated 16-12-2004, permitting the Complainant to examine a witness, namely, the Bank Manager, a witness who was not cited by the complainant, earlier. In fact, the Complaint was not accompanied by a list of witnesses as required under Sub-section (2) of Section 204 of the Code of Criminal Procedure, 1973, (Code, for short),

3. Rule was issued on 10-8-2005 and, therefore, this petition deserves to be disposed of on merits though it is otherwise submitted on behalf of the

Complainant, that revisional remedy was available to the accused against the said Orders.

4. As far as the first Order dated 16-01-2001 is concerned, I am not inclined to exercise extraordinary jurisdiction u/s 482 of the Code to allow the accused to challenge the same, as the accused has approached this Court belatedly after more than four years, four months and that too after having unsuccessfully challenged the said Order in revision before the Court of Sessions. Whether in the said revision the ground of Sub-section (2) of Section 204 of the Code was taken or not would be immaterial since it was expected on the part of the accused to have taken all grounds available to him, when he challenged the said Order dated 16-01-2001 issuing process against him.

5. As far as the second Order dated 16-12-2004 is concerned, the learned J.M.F.C. has permitted the Complainant to examine one witness by name Sharad Samant, whose name was earlier not cited by the Complainant along with the complaint. The learned J.M.F.C. has permitted the Complainant to examine the said witness u/s 311 of the Code and it is conceded on behalf of the Complainant that leave to examine the said witness could not have been granted u/s 311 of the Code but u/s 254 of the Code. Sub-sections (1) & (2) which are relevant reads as follows:

(1) If the Magistrate does not convict the accused u/s 252 or section 253, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

(2) The Magistrate may, if he thinks fit on the application of the prosecution or the accused, issue a summons to any witness directing him to attend or to produce any document or other thing.

6. Shri Vahidulla on behalf of the accused has submitted that the Complainant was not entitled to examine any further witnesses because the Complainant had filed no list of witnesses and in support of the said submission, learned Advocate Shri Vahidulla, has placed reliance on the case of Sanyogita Shivnath Nandedkar v. Suprabha Rajendra Junghare 2004 ALL MR (Cri) 2296

On the other hand, Shri Sardessai, the learned Counsel on behalf of the respondents, has submitted that filing of list of witnesses is not fatal to the case of the Complainant and the Complainant could also file additional list and examine more witnesses as contemplated under Sub-section (2) of Section 254 of the Code and in support of the said submission, Shri Sardessai has placed reliance on decisions of this Court in the case of Shashi Nair Vs. R.C. Mehta and Others, and Vashu Gokaldas Kukreja v. Meena Vashu Kukreja and Anr 2004 Bom. C.R. (Cri) 734

7. In Sanyogita Shivnath Nandedkar v. Suprabha Rajendra Junghare (supra), the complaint was dismissed by the learned Sessions Judge, as it was not filed along

with the list of witnesses. The Complainant having approached the High Court, the High Court held that the approach of the learned Sessions Judge was legal and correct and confirmed the view that since the complaint was not filed or prosecuted in conformity with Section 202(2) of Cr. P.C., the complaint was liable to be dismissed.

8. In the case of Shashi Nair and R.C. Mehta (*supra*), this Court referred to State of Bombay v. Janardhan AIR 1960 Bom 513, wherein it was held that original list given u/s 204(1) could be added by further names and witnesses so added could be examined. This Court also referred to Shubrati Khan Vs. State, , wherein it was held that Magistrate could issue summons to a witness whose name was not mentioned in the original list u/s 204. This Court then referred to another decision of this Court in Madhaorao Pandurang v. Yeshwant (Cr. Rev. Appl. No. 341/68 decided on 17-6-1969) and observed that the jurisdiction of the Magistrate u/s 204(1) to issue summons or warrant in the first instance, cannot be taken away by the failure on the part of the Complainant to file list of witnesses and that Section 204(1-A) (*sic.*) did not control Section 244(1) or 244(2). Thereafter, this Court held that there is nothing in Section 244(1) or (2), which restricts the power of the Magistrate to take evidence only of those witnesses whose names are not mentioned in the list referred to in Section 204(1-A) and, therefore, the provisions regarding submission of a list of witnesses in Section 204, cannot be considered as mandatory so as to control the jurisdiction of the Magistrate to proceed with the trial of the accused and record his plea. The Court held that the provisions of Section 204 of the Criminal Procedure Code were not mandatory in nature and if before the list of witnesses is filed, the Magistrate issues a summons to the accused after he is satisfied that there is sufficient ground for proceeding against the accused, he does not act without jurisdiction and further proceedings after the appearance of the accused are not invalid. Unless clear prejudice is shown to have been caused to the accused by a late submission of the list of prosecution witnesses, the order issuing a summons to him cannot be said to be vitiated. The Court also held that the provisions of Section 204 were directory and it is the duty of the Magistrate to secure compliance with the requirement of Section 204(1-A), at the earliest possible stage of the proceedings to avoid any prejudice to the accused if for some reasons he did not insist on the list of witnesses to be filed along with the complaint.

9. In the case of Vashu Gokaldas Kukreja v. Meena Vashu Kukreja and Anr. (*supra*), an application for recall of process was filed on the ground that before process was issued, the list of witnesses was not submitted and it was held that the defect could not be the reason to recall the process more so when the list of witnesses proposed to be examined was already submitted along with the application as on the date when the application presumably to recall the process was decided and it was held that the view taken by the Court did not, in any way, cause prejudice to the accused but was a step forward in ensuring that miscarriage of justice would not occur.

10. In the case at hand the accused did not at all challenge the Order issuing process dated 16-1-2001 for a long period on the ground that the issue of process was vitiated on account of non filing of the list of witnesses and although the accused had filed a Revision Application, before the Court of Sessions, the accused did not take up that plea before the Sessions Court. It is obvious that no prejudice was caused to the accused. It would be rather too late in the day now to challenge the said Order issuing process on the ground that Sub-section (2) of Section 204 of the Code was not complied with. The only question before the Court is whether because the Complainant had not filed the list of witnesses, as contemplated by Sub-section (2) of Section 204 of the Code, that the Complainant is precluded from examining other witnesses. Shri Vahidulla, the learned Counsel on behalf of the accused submits that issuing summons to any witnesses, as contemplated by Sub-section (2) of Section 254 of the Code would mean issuing summons only to the witnesses whose list was filed by the Complainant. In my view, such a submission cannot be accepted.

11. Section 254 of the Code is found in the Chapter dealing with trial of summons cases by a Magistrate and Sub-section [1] thereof provides that if the Magistrate does not convict the accused u/s 252 or Section 253, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence. Sub-section (2) of Section 254 of the Code provides that the Magistrate, may, if he thinks fit, on the application of the prosecution or the accused, issue a summons to any witness directing him to attend or to produce any document or other thing. (Emphasis supplied).

12. Section 254(1) of the Code give ample discretion to a J.M.F.C., to take "all such evidence as may be produced in support of the prosecution and not only that it also gives discretion to a J.M.F.C. to issue summons to any witness directing him to attend" and to give his evidence. In case, the provisions of Section 254 were subject to the compliance of the provisions of Section 204(2), then Section 254 of the Code, which comes later, would have expressly provided so. In my view, in order to exercise the powers u/s 254(1), it is not a condition precedent that a list of witnesses had to be filed u/s 204(2) of the Code. Likewise, Section 254 also does not contemplate that the witnesses to be examined would be only those witnesses who were cited on behalf of the Complainant, earlier in the list filed, in terms of Sub-section (2) of Section 204 of the Code. There is no doubt that Sub-section (2) of Section 204 of the Code is meant to safeguard the interest of the accused persons against undue harassment at the hands of unscrupulous litigants. The insistence on filing a list of prosecution witnesses before the issue of process to the accused is mainly for that purpose. In other words, the intention is to assure that no person is summoned to stand his trial without the Court first satisfying itself that there is sufficient ground to issue a summons or a warrant, as the case may be, against accused persons and about the witnesses to be produced in support of the case of the Complainant. In a proper case, the Complainant would be entitled to file

even an additional list of witnesses. There is nothing in Section 204 of the Code, which says or indicates that if no list of prosecution witnesses is filed before process is issued to the accused, then none can be filed later. This does not mean that the salutary provision in Sub-section (2) of Section 204 of the Code can be vitiated with impunity. In this context, reference could also be made to page 2396 of Sohoni's Code of Criminal Procedure, wherein it is stated that the provisions of Sub-section (2) of Section 204 of the Code can be vitiated with impunity. In this context, reference could also be made to page 2396 of Sohoni's Code of Criminal Procedure, wherein it is stated that the provisions of Sub-section (2) of Section 204 of the Code does not mean and imply that in no circumstances can a person who is not included in a list be permitted to be examined in the course of the trial. If that was the real intention, one would expect a clearer and firmer expression of the view of the Legislature, then what is to be found in Sub-section (2). Moreover, if this extreme contention was to prevail, it would have the effect of abolishing Section 254(1) of the Code. This Section does not say that the evidence must be evidence of only those persons whose names appear in the list of witnesses filed u/s 204(2) of the Code. Sub-section (2) of Section 204 of the Code does not override Section 254(1) of the Code which imposes a duty on the Magistrate to take evidence as may be produced in support of the prosecution. In my view, although the learned J.M.F.C. has cited a wrong provisions of law by referring to Section 311 of the Code, as the power enabling her to permit the Complainant to lead evidence of the said witness, whose name was not cited, the power to examine other witnesses could be traced to Section 254(1) of the Code and viewed thus, the Order of the learned J.M.F.C., dated 16-12-04, could not be faulted. The controversy appears to have been settled with the decisions of this Court in Madhaorao Pandurang (supra), which was followed in Shashi Nair (supra), which have my respectful concurrence, for other reasons as well stated hereinabove.

13. Shri Sardessai, the learned Counsel on behalf of the Complainant assures that in case more witnesses are required to be examined, then the complainant would certainly file a list of witnesses to be examined on behalf of the Complainant. In case such a list is filed, the learned Magistrate would be at liberty to deal with the same in accordance with law.

14. In the light of the above, I find there is no merit in this petition and consequently the same is hereby dismissed with costs. Both the parties are hereby directed to appear before the learned J.M.F.C. Bicholom, on 2nd May, 2006, at 10.00 am. for further proceedings.